

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

Digital-Vending Services International, LLC,)	
)	
Plaintiff,)	Case No. 2:09-cv-555-AWA-TEM
)	
v.)	
)	
The University of Phoenix, Inc., <i>et al.</i> ,)	
)	
Defendants.)	

DEFENDANTS' MOTION FOR SANCTIONS FOR SPOILIATION

Pursuant to Federal Rule of Civil Procedure 37(b)(2) and this Court's inherent authority to control the judicial process, Defendants The University of Phoenix, Inc. and Apollo Group, Inc., by counsel, move for sanctions against Plaintiff Digital-Vending Services International, LLC ("DVSI") for spoliation of evidence.

DVSI has lost or destroyed two key items of evidence in this case:

- (1) Recorded interviews of the inventors discussing the conception of the claimed inventions, which DVSI had in its possession while it prepared to bring this case against Phoenix; and
- (2) A "thumb drive" storage device entitled "Important DVSI Documents" that DVSI possessed as late as 2011, while this case was pending.

In light of the longstanding pattern of DVSI's discovery misconduct, the failure of the Court's prior sanctions to deter DVSI's continued misconduct, and the critical nature of the evidence DVSI destroyed or failed to preserve, Defendants submit that the severe sanction of dismissal is warranted and fully supported by the case law from the Fourth Circuit. If the Court

is not inclined to dismiss the claims outright, Defendants respectfully request that the Court impose the following sanctions for spoliation:

First, with respect to both the inventor interviews and the “Important DVSI Documents” thumb drive, the Court should instruct the jury that it may draw an adverse inference that documents that DVSI lost or destroyed were unfavorable to DVSI’s claims and defenses.

Second, the Court should prohibit DVSI from calling the inventors, Vincent Darago and Christopher Jenkins, to testify regarding the alleged inventions.

Third, the Court should also prohibit DVSI from telling the jury that the invention was conceived in 1994.

Pursuant to Rule 37(b)(2)(C), Phoenix also seeks its fees and expenses arising from the spoliation and the prosecution of this motion. Phoenix also requests that the Court impose whatever additional relief it deems appropriate to deter still more misconduct by DVSI.

A memorandum in support accompanies this motion. Defendants request that Court grant the motion.

Respectfully submitted,

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RULE 37(E) STATEMENT OF COUNSEL

Pursuant to Rule 37(E) and Federal Rule of Civil Procedure 37(a)(1), I state that a good faith effort has been made by counsel to resolve the discovery matter at issue. Specifically, in separate telephone conferences on June 11 and 12, 2012, counsel for Plaintiff (William M. Parrish, Michael P. Adams, and Brian King) and counsel for Defendants (Michael S. Nadel, Christopher D. Bright, and Rebecca Watson) conferred by telephone and explored the possibility of resolving the discovery matters in controversy.

/s/ Michael S. Nadel

Michael S. Nadel

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2013, a true and correct copy of the foregoing was filed electronically using the CM/ECF system. As such, this document was served on all counsel who have consented to electronic service, including as follows:

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